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# Legal Considerations Concerning Communications of the UIRC

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## Commission Meeting of June 29, 2021

Presented By: Matthew M. Cannon, Shareholder

## Utah Code § 20A-20-301(4)

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- A member of the commission may not engage in any **private communication** with any individual *other than* other members of the commission or commission staff, including consultants retained by the commission, . . .
- that is **material** to any **redistricting map** or **element** of a map . . .
- **pending before** the commission or **intended to be proposed** for commission consideration,
- **without** making the communication, or a detailed and accurate description of the communication including the names of all parties to the communication and the map or element of the map, available to the commission and to the public. Utah Code § 20A-20-301(4).
- A member of the commission shall make the disclosure . . . *before* the redistricting map or element of a map is considered by the commission.” *Id.*

## Example 1

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- Commissioner Durham is scrolling Twitter and notices that she received a message from a prominent Utah attorney. The attorney tells Commissioner Durham that he just submitted his proposed map to the UIRC. The attorney sends a photo of the map and asks the Commissioner what she thinks of it. Commissioner Durham replies: “Thanks! I will take a look.”

## Example 2

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- Commissioner Bishop is at the Weber State – Utah Football Game in September and is approached by a Wildcat fan. The fan feels passionate about the Hill Airforce Base and tells Commissioner Bishop that Hill is his community of interest. The fan then asks the Commissioner if the Commission intends to keep Hill and its community in the same congressional district. A week prior, Commissioner Bishop and Commissioner Facer discussed this very issue and agreed to put forth a map that kept Hill “whole.” Commissioner Bishop, unsure how to respond to the fan, says, “Well, what do you suggest exactly?” The individual goes on to describe the Hill community and its reach. Commissioner Bishop asks the individual if Glen Eagle Golf Course is part of the Hill community. The person replies, “Absolutely.” Commissioner Bishop thanks the individual and moves on.

## Example 3

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- Commissioner Hale attends the Sugarhouse Community Council one evening. During a break, a group of parents approach her and ask her to make sure that Highland High School and East High School remain in the same State School Board District. The parents tell Commissioner Hale that they want these schools/communities to speak with one voice to the State School Board. Commissioner Hale responds, “Well, I can understand that. Highland and East have a lot of common interests.” The parents then tell Commissioner Hale that they submitted their community of interest maps to the state for consideration and handed her a printed-out copy of the proposed community of interest. Commissioner Hale thanks them for the map and notes that she agrees with the general boundaries of the community.

# GRAMA

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- GRAMA requires the preservation of government records.
- Broadly defined to include:
  - Text Messages
  - Emails
  - Phone Records
  - Other Message Platforms (e.g., Signal, WhatsApp).
- Even your “private” communications can constitute public records.

## Legislative Privilege (1 of 3)

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- A privilege available to legislators and their staff that shields information certain documents (broadly defined) used by legislators in developing redistricting plans.
- The privilege is *not* absolute, and its scope may vary depending on the issues at stake.
- Redistricting is a legislative act. (See *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137 ¶ 16 (App. 2003)).
- Therefore, the protection could apply to the UIRC as well.



## Legislative Privilege (2 of 3)

- Federal courts use a multi-factor balancing test to apply legislative privilege.
- Courts weigh the following factors:
  - Relevance of the evidence sought to be protected;
  - Availability of other evidence;
  - “Seriousness” of the litigation and the issues involved;
  - Role of government in the litigation; and,
  - Possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

# Legislative Privilege (3 of 3)

## Not Protected:

Documents/communications re: non-legislative tasks;

Fact based documents and communications;

Documents/communications that legislators or staff:

- Created after the redistricting process,
- Shared with 3<sup>rd</sup> parties consulted during the process;
- Produced for legislators that reflect opinions, recommendations, or advice; however, any comments, requests or opinions expressed by legislators or their aides in communication with committee staff may be redacted.

Redistricting plans on record, or proposed, during the redistricting process.

Any relevant documents or information that were shared with third parties, which would otherwise have been protected by the legislative privilege.

## Possibly Protected:

Any documents or information that contains, involves, or reveals opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff.

Documents or communications produced by legislators or their aides before the redistricting legislation date of enactment, unless any such document pertains to, or reveals an intent to or awareness of: discrimination against voters on the basis of their known or estimated political party affiliation, or the impact of redistricting upon the ability of voters to elect a candidate of their choice.

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